No. 89-754

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

RADIX GROUP INTERNATIONAL, INC.,

Petitioner,

-against-

McGRIFF TREADING COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION THREE

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QUESTIONS PRESENTED FOR REVIEW

(1) Is it a violation of the Due Process Clause of the Fourteenth Amendment for a State Court, without notice to a party or an opportunity to be heard, without a trial or any testimonial evidence, and without a finding of willfulness or culpable conduct by the party itself, summarily to impose multiple punitive sanctions against the party consisting of (a) dismissal of the party's complaint, (b) striking the party's answer to an interposed cross-complaint and entering the party's default thereon and (c) assessment of monetary sanctions, solely on the basis of the transgressions of the party's counsel in the discovery process as to which it is conceded that the party had no knowledge and did not participate?

(2) Is it a violation of the Due Process Clause for a State Court, following the striking of a party's answer to a cross-complaint as a sanction for the discovery abuses of its counsel, to award *ex parte* punitive and compensatory damages on the defaulted claim against the party, without testimony or a hearing in which the party has an opportunity to be heard to participate, to present evidence and to examine witnesses?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of the petition, Globe Transportation Services, Inc. ("Globe") was an additional defendant named in petitioner's complaint and in respondent's cross-complaint. Globe, who was in bankruptcy, was dismissed as a defendant on both the complaint and cross-complaint after respondent's motion for termination sanctions against petitioner was granted.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION THREE

Radix Group International, Inc. ("Radix") respectfully petitions for a writ of certiorari to review the order of the Court of Appeal of the State of California, Second Appellate District, Division Three in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, affirming the orders of the Superior Court, County of Los Angeles and rejecting petitioner's federal constitutional challenge is unreported and is reproduced in the Appendix hereto at pages 1a to 12a.

The order of the Supreme Court of California denying petitioner's petition to review the Court of Appeal order of affirmance (Justice Mosk dissenting) is unreported and is reproduced in the Appendix hereto at page 19a. The decision and order of the Superior Court of Los Angeles County dated February 3, 1988, granting the application of respondent McGriff Treading Company, Inc. ("McGriff") for terminating sanctions, pursuant to Sections 2023(b) and 2031(k) of the California Code of Civil Procedure, dismissing Radix' complaint and striking its answer to McGriff's cross-complaint and awarding monetary sanctions, is unreported and reproduced in the Appendix hereto at pages 17a - 18a. The order of the Superior Court dated March 21, 1988 awarding McGriff a default judgment on its cross-complaint of $29,000 compensatory damages and $40,000 punitive damages, and the March 25, 1988 Judgment entered thereon, are unreported and reproduced in the Appendix hereto at pages 13a - 14a, 20a - 21a. The order of the Superior Court dated June 3, 1988, denying Radix' motion for an order vacating the default and the default judgment and setting aside the orders of the Superior Court, is unreported and reproduced in the Appendix hereto at pages 15a - 16a.

JURISDICTION

The order and judgment of the Court of Appeal was entered on May 24, 1989 and became final upon the denial of review by the Supreme Court of California entered on August 10, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in pertinent part:

> "[N]or shall any state deprive any person of . . . property, without due process of law . . . .

Sections 2023(b) and 2031(k) of the California Code of Civil Procedure, under which respondent moved for, and was granted, terminating sanctions against petitioner, provide in relevant part:

> "(b) [Sanctions for Misuse of Discovery] To the extent authorized by the section governing any particular discovery method or any other provision of this article, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may

impose the following sanctions against any one engaging in conduct that is a misuse of the discovery process."

* * *

"(4) The court may impose a terminating sanction by one of the following orders:

(A) An order striking out the pleadings or part of the pleadings of any party engaging in the misuse of the discovery process.

(B) An order staying further proceedings by that party until an order for discovery is obeyed.

(C) An order dismissing the action, or any part of the action, of that party.

(D) An order rendering a judgment by default against that party.

(5) The court may impose a contempt sanction by an order treating the misuse of the discovery process as a contempt of court."

Section 2031(k) California Code of Civil Procedure

"(k) [Effect of Failure to Serve Timely Response; Motion for Relief; Motion to Compel Response; Sanction] If a party to whom an inspection demand has been directed fails to serve a timely response to it, that party waives any objection to the demand, including one based on privilege or on the protection for work product under Section 2018. However, the court, on motion may relieve that party from this waiver on its determination that (1) the party has subsequently served a response that is in substantial compliance with subdivision (f), and (2) the party's failure to serve a

timely response was the result of mistake, inadvertence, or excusable neglect.

The party making the demand may move for an order compelling response to the inspection demand. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey the order compelling a response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023."

STATEMENT OF THE CASE

THE FACTS

Last Term, this Court acknowledged that while there is a serious constitutional question of the extent to which the Due Process Clause limits awards of punitive damages, there is no dispute that an award of punitive damages may not stand "if it was reached in proceedings lacking the basic elements of fundamental fairness." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989). This case presents such a situation.

Unlike cases in which punitive damages are awarded or sanctions imposed on a full record after a hearing or trial before a court or jury, the Superior Court (the court of original jurisdiction) here not only imposed drastic terminating sanctions against Radix without notice to it for the conduct of its counsel, about which it had no knowledge, but also assessed punitive damages and compensatory damages in an *ex parte* proceeding from which petitioner was precluded from attending, offering evidence, examining witnesses or participating in any manner whatsoever. The California Court of Appeal affirmed such action as being authorized by the California Code of Civil Procedure and the policy of the State, and the Supreme Court of California, one Justice dissenting, refused review.

The terminating sanctions imposed against Radix consisted of the dismissal of its complaint, the striking of the answer to McGriff's cross-complaint and the concomitant entry of Radix' default on that cross-complaint, and monetary sanctions. The basis for the imposition of these drastic sanctions, and the subsequent assessment against Radix of compensatory and punitive damages by a proceeding in which Radix was precluded from participating, was not anything done or not done by Radix; nor was there a finding that Radix had participated in, or knew of, the predicate acts that precipitated the court's action. The conduct that prompted the court's action was the failure of Radix' attorney to comply with certain discovery requests, most specifically a document request, about which he did not even inform Radix. In fact, Radix' attorney forged petitioner's verifications to discovery matters, concealed that a cross-complaint had been interposed against petitioner, and wholly misrepresented to it the status of the lawsuit so that it remained ignorant of what was occurring until its bank account was attached by the respondent herein.

Petitioner is an international freight forwarder doing business in a number of states including California, and had been represented in some collection matters in that State by the local law firm of Armenta & Yanes (R. 750:10-12).*

On October 25, 1985, Michael Armenta ("Armenta") of that firm filed a complaint on behalf of petitioner in the

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* References in parenthesis, unless otherwise indicated, refer to pages in the Record in the court below.

underlying action against respondent and Globe to collect the sum of $60,000 in connection with import shipments consigned to respondent (R. 1).

On March 24, 1986, respondent filed its answer (R. 8). It also served on Armenta a cross-complaint against petitioner and Globe (R. 16 - 42) charging petitioner, *inter alia*, with conversion of respondent's property and demanding compensatory and punitive damages in an unspecified amount. The representation was made in the cross-complaint that it would be amended at trial to specify the sums demanded. Armenta never advised petitioner of the existence of a cross-complaint and, without authority to do so, filled an answer on May 1, 1986 (R. 43, 751:21 - 23, 756:14 - 16, 758:23 - 26). Had petitioner been apprised of the cross-complaint, its defense would have been undertaken by its insurance carrier on an errors and omission policy which it at all times carried. The fact is that petitioner never knew of the cross-complaint or of any claim for compensatory or punitive damages against it (R. 758:25 - 26).

In 1986 petitioner requested a report from Armenta concerning the cases that he was handling. He replied as regards this case that "This matter is still in litigation. Discovery is ongoing. Nothing to report at this time." (R. 750:16 - 21.)

On November 5, 1986, respondent moved to compel petitioner to provide further answers to interrogatories. Armenta never informed petitioner of either the interrogatories or the motion and, to the extent that he fashioned responses, he did

so without petitioner's knowledge and he forged the verification of an employee of petitioner who was unaware of his acts (R. 758:9 -13, 758:14 - 22, 759:1 - 4).

In April 1987 petitioner again requested Armenta to provide a current summary of all pending matters, including this one, (R. 753:11 - 13) and received the response that "This matter is in litigation. Respondent is an Alabama corporation that owes Radix approximately $40,000.00. Respondent attempted to convince a local court to transfer this matter to Alabama but we were able to prevent this. We have done some discovery and are awaiting a trial date, which will probably be in 1 1/2 to 2 years." (R. 753:15 - 22.) No other information was provided.

On November 13, 1987, respondent moved to compel compliance with its demand for inspection of documents. Again, Armenta never informed petitioner of either the document demand or the motion, or the fact that he failed to appear on the return date and that the motion was granted and sanctions were imposed. (R. 226, 265.) Without petitioner's knowledge, Armenta later prepared responses and supplemental responses, again forging the verification of petitioner's employees (R. 756:17 - 27).

In January 1988, respondent applied to the Superior Court for an order dismissing Radix' complaint and its answer to the cross-complaint as a terminating sanction under Sections 2023(b) and 2031(k) of the California Code of Civil Procedure based on petitioner's alleged failure to comply with an order of the court dated December 2, 1987 compelling document

production (R. 271, 371). Armenta did not inform Radix of either the order or respondent's motion. Armenta belatedly opposed that application, but did not appear at the hearing, and the court did not consider the opposition papers (R. 375, 417). Respondent's application for terminating sanctions was granted on February 3, 1988, petitioner's complaint was dismissed and the answer to the cross-complaint was stricken, monetary sanctions were awarded, and petitioner was treated as having defaulted with regard to the cross-complaint (R. 417).

The Superior Court dispensed with the requirement for *viva voce* testimony to determine the amount of the unliquidated damages to be awarded respondent on the cross-complaint and permitted the issue of the amount of compensatory and punitive damages to be "proved up" by way of an *ex parte* procedure based on respondent's affidavits only, without notice to petitioner itself and without any opportunity for petitioner to be heard or to contest respondent's evidence. That procedure differs from the procedure required under Rule 55 Fed. R. Civ. P. and under the rules of most States. See Annot., Defaulting Defendant's Right to Notice and Hearing as to Determination of Amount of Damages, 15 A.L.R. 3d 586; Annot., Effect, Under Rule 55(b)(2) of the Federal Rules of Civil Procedure and Similar State Statutes and Rules, of Failure, Prior to Taking Default Judgment Against Party Who Has Appeared, to Serve 3-Day Written Notice of Application For Judgment, 51 A.L.R. 2d 837.

Compensatory damages were fixed by the court at $29,000 and punitive damages fixed at $40,000. There was no

finding of "oppression, fraud or malice" by Radix to support the punitive damage award. See California Civil Code § 3294.

The first indication that anything was amiss came in April 1988, when petitioner was notified by its California bank that respondent had levied a Writ of Execution. (R. 751:21 - 24, 756:14 - 16 and 758:23 - 26.) At approximately the same time, petitioner also learned that Armenta had converted monies in another collection matter (R. 754). Petitioner immediately terminated Armenta and retained new counsel. (R. 751:24 - 752:16, and 756:10 - 13.) Armenta refused to execute a Substitution of Attorney, refused to deliver his files to the new counsel (R. 726 - 27) and instead, notwithstanding his termination, filed motions for relief and to compel respondent to comply with discovery requests, which the court refused to hear. (R. 546, 592 and 723 - 28.) Petitioner was compelled to, and did, move to have new counsel substituted. (R. 534.)

Petitioner promptly filed a motion for relief, requesting that the Court set aside the default and the dismissal of its complaint, the default judgment on respondent's cross-complaint, and reinstate petitioner's answer thereto. (R. 731, 733.) The motion was denied on June 3, 1988 (R. 807).

THE DUE PROCESS QUESTIONS WERE RAISED BELOW

Appeal was taken to the Court of Appeal of the State of California, Second Appellate District, Division Three where petitioner argued that the procedures followed by the Superior Court were a violation of procedural due process since the terminating sanctions were not imposed for any "wilful" acts by Radix, which had no knowledge of any default in discovery and no knowledge of Armenta's acts and conduct. Radix did not even know that respondent had served any discovery demands.

Procedural due process was also argued to be violated by the dismissal of an action and the striking of an answer for the discovery misconduct of its attorneys, without affording the party itself the opportunity for a hearing and without any finding that the party, as distinct from the attorney, had acted in bad faith, or even knew of its attorney's conduct. The *ex parte* procedure for determining both punitive and compensatory damages against Radix, was also challenged as a constitutional due process deprivation.

Excerpts from petitioner's briefs in the Court of Appeal reflecting that the due process questions were timely and properly raised appear at pages 22a through 30a of the Appendix attached hereto.

The Court of Appeal rejected those arguments. It accepted, as factual, that petitioner was never informed of the existence of respondent's cross-complaint (Appendix at page

2a), that signatures may have been forged in some discovery matters, that thefts of funds by Armenta may have occurred, and that it was "Armenta's conduct" and not petitioner's which prompted the motion for terminating sanctions, but held that under applicable standards there was no basis "for relieving Radix of the consequences of Armenta's negligence" (Appendix at page 9a).

Addressing the constitutional issue occasioned by the *ex parte* nature of the prove-up procedure utilized by the Superior Court to determine both punitive and compensatory damages, the Court of Appeal found that:

> "Although Radix had no right to counter McGriff at the prove-up (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385), McGriff was nonetheless required affirmatively to establish its right to recovery. Under the facts, that evidence necessarily negated the claims of Radix's complaint; and the record demonstrates it was legally sufficient to do so. Accordingly, we find no denial of due process."

The constitutional issues were presented to the California Supreme Court in Radix' petition for review, which was denied, Justice Mosk dissenting.

In the Supreme Court of California, Radix again

asserted that the action of the Superior Court constituted a deprivation of constitutional due process. The petition was denied without opinion. The relevant excerpts from the petition to the California Supreme Court appear at pages 31a - 38a of the Appendix attached hereto.

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant Review to Decide The Extent to Which Procedural Due Process Requires Notice to an Innocent Party And The Opportunity to be Heard Before a Pleading is Struck For The Discovery Malfeasance of The Party's Counsel And a Determination That The Party Either Wilfully or Knowingly Participated in The Attorney's Transgressions.

B. The Court Should Grant Review to Determine Whether as a Matter of Due Process Punitive Damages And Compensatory Damages May be Determined *Ex Parte* Without Hearing, Without Testimony, And Without Any Opportunity For Participation Following the Striking of a Pleading as a Sanction.

There is involved in this extraordinary case, we respectfully submit, a violation of the most basic principles of due process as Radix has had its complaint dismissed, its answer stricken and its default entered on respondent's cross-complaint, and had punitive and compensatory damages assessed against it when it:

(i) had no notice of, and was not granted the right to contest, the amount of punitive damages or compensatory damages assessed against it in the *ex parte* procedure followed by the Superior Court;

(ii) had no knowledge of, or participation in, any of the acts or omissions that caused the Superior Court's imposition of terminating sanctions which resulted in both the dismissal of its complaint and the treatment of the cross-complaint and the punitive damages claim contained therein as defaulted;

(iii) had no opportunity to be heard as to whether or not any sanctions were proper, what those sanctions might be, or whether respondent was entitled to punitive or compensatory damages on its cross-complaint;

(iv) was assessed sanctions and punitive damages that were not, and were not intended to be, compensatory or in conformity with any standard other than the judge's unconstrained subjective and irritated annoyance at the attorney; and

(v) was not guilty of wilfulness, participation in, or knowledge of the misconduct of the attorney, and there was no factual finding of despicable conduct by Radix to support the *ex parte* award of punitive damages.

Whatever the fault of Armenta and whatever right the court may have had to punish him, there was no justification to substitute the non-culpable client for the attorney and deprive it of its property without notice or the right to be heard. As was aptly stated in *Daniels v. Williams*, 474 U.S. 327, 331 (1986),

"[t]he touchstone of due process is protection of the individual against arbitrary action of government." Going further and striking directly at the very core of constitutional protection, the California Court of Appeal upheld the assessment of compensatory and punitive damages based on a procedure under which it was recognized that:

> "Radix [petitioner] had no right to counter McGriff [respondent] at the prove-up."

Thus, in sharp contrast to the procedures followed by federal and most state courts to determine unliquidated claims against defaulted parties at a hearing at which the defaulted party has the right to attend and participate, see Annot. Defaulting Defendant's Right to Notice and Hearing as to Determination of Amount of Damages, 15 A.L.R. 3d 586, 589 ("no case included herein has denied a defaulting party the right to participate in such a hearing; and it has been held that a defaulting party may cross-examine the opposing witnesses and introduce evidence on his own behalf in mitigation of the damages"); Annot. Effect, Under Rule 55(b)(2) of the Federal Rules of Civil Procedure and Similar State Statutes and Rules, of Failure, Prior to Taking Default Judgment Against Party Who Has Appeared, to Serve 3-Day Written Notice of Application For Judgment, 51 A.L.R. 2d 837, the Superior Court here conducted an *ex parte* proceeding from which Radix was precluded from participating, and from contesting respondent's affidavits, and from offering any evidence in mitigation or amelioration on the punitive or compensatory damages issues.

The utilization of an *ex parte* procedure to fix compensatory and punitive damages is violative of the basic right to be heard. In the context of punitive damages, the due process concerns are even greater as punitive damages are of a "penal nature," *Browning-Ferris*, 109 S. Ct. at 2932 (O'Connor, J. concurring in part and dissenting in part) and awarded to "punish reprehensible conduct and to deter its future occurrence." *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974). An *ex parte* award of punitive damages is nothing less than the exaction of a penalty without a hearing. As noted earlier, this Court has acknowledged that the Due Process Clause applies to awards of punitive damages and most recently has stated that "it is not disputed that a jury award [of punitive damages] may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness." *Browning-Ferris*, 109 S. Ct. at 2921 (emphasis added); *See also Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988). Given the "penal nature" of punitive damages, "the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits." *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. at 1655 (O'Connor, J., concurring in part). Petitioner is aware of no case yet to come before this Court where punitive damages were awarded *ex parte* against a party who had no opportunity to present evidence in mitigation of such an award.

By virtue of the "penal nature" of punitive damages, Due Process also requires that the punishment fit the particular defendant's culpability. As this Court has noted, "[t]he focus [of

punitive damages] is on the character of the tort feasor's conduct." *Smith v. Wade*, 461 U.S. 30, 54 (1983). There must be an individualized determination of a defendant's culpability. Indeed, the California statute providing for punitive damages requires it. Under California Civil Code § 3294, a plaintiff may only recover punitive damages "in an action for the breach of an obligation not arising from contract where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice" and those terms are specifically defined therein (Section 3294(c)) as follows (emphasis added):

> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Petitioner submits that such a determination can only be made following a hearing at which the party against whom punitive damages are sought has an opportunity to be heard. Petitioner also submits that it was a violation of the Due

Process Clause for the Superior Court to award punitive damages against Radix without any finding whatsoever that it personally had engaged in the "despicable conduct" required by the California statute to support such an award.

Had petitioner been given notice and an opportunity to be heard, it would have been able to establish: (a) that respondent knew that its so-called converted property was in a United States government warehouse and available to respondent upon payment by it of appropriate customs duties, (b) that respondent had not paid for any of the services upon which petitioner's complaint was based, (c) that respondent's claim was properly against Globe, to whom it alleged it had made payment and which had gone into bankruptcy, and (d) that petitioner had engaged in no acts or conducts which would warrant either the dismissal of its complaint or the striking of its answer and the granting of judgment on respondent's cross-complaint, or the imposition of punitive damages, let alone all of them.

Additionally, this Court has recognized that it is a deprivation of due process to dismiss an action or strike a pleading for non-compliance with discovery orders when the non-compliance is not due to the wilfulness, bad faith or other fault of the party itself. *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958). This Court has held that:

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be

> deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409; and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed.), p. 4325.
>
> * * * * *
>
> In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to wilfulness, bad faith, or any fault of petitioner.

Id. at 209, 212.

Rule 37 Fed. R. Civ. P. is the federal analogue to the terminating sanction administered by the court below and is the rule upon which the California statute (Section 2023) was patterned. Following the rationale of *Societe Internationale*, several circuits have held that, because of the due process

implications, it is improper under Rule 37 to impose the drastic sanction of dismissal or the striking of a pleading against a party who neither knew, participated in, or encouraged his counsel's discovery derelictions. The Tenth Circuit in *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869 (10th Cir. 1987) held that:

> "Because a default judgment is a harsh sanction, due process requires that 'failure' is a sufficient ground only when it is the result of 'wilfulness, bad faith, or [some] fault of petitioner' rather than inability to comply. *National Hockey League*, 427 U.S. at 640 [other citations omitted] . . . We have defined a willful failure as 'any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown.' [Citations omitted.]"

834 F.2d at 872 (emphasis added).

Similarly, in *Edgar v. Slaughter*, 548 F.2d 770 (8th Cir. 1977), a default judgment on a defendant's counterclaim was vacated. The court stated that "in our system of justice the opportunity to be heard is a litigant's most precious right and should be sparingly denied" and that:

> "Dismissal and entry of a default judgment should be the rare judicial act. When noncompliance is the result of dilatory conduct by counsel, the courts should investigate the attorney's responsibility as an officer of the court and, if appropriate, impose on the client sanctions less extreme than dismissal or default, unless it is shown that the client

> is deliberately or in bad faith failing to comply with the court's order."

548 F.2d at 773.

The Ninth Circuit has also required *scienter* on the part of the party itself as a prerequisite to the imposition of a termination sanction.

> "[I]n order to warrant imposition of these severe sanctions, the violation(s) must be 'due to wilfulness, bad faith, or fault of the party.'" [Emphasis added.]

United States v. Kahaluu Construction Co., Inc., 857 F.2d 600, 603 (9th Cir. 1988); *see also, Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585 (9th Cir. 1983).

All of these courts observed that dismissal should be a sanction of last resort to be applied only after alternatives have been explored without success. Applying that principle, the District of Columbia Circuit in *Shea v. Donohoe Construction Co.*, 795 F.2d 1071 (D.C. Cir. 1986) ordered reinstatement of a complaint that had been dismissed because the plaintiff's attorneys failed to appear at three status conferences. Stating its "reluctance to penalize an innocent client," 795 F.2d at 1078, the Circuit Court held as follows:

> We look disfavorably upon dismissals as sanctions for attorney misconduct or delay unless the client himself has been made aware of the

> problem, usually through notice from the trial court. We advise strongly that district courts themselves directly notify the client when attorney misconduct has occurred to a degree that the court is contemplating dismissal if a recurrence occurs. That communication should notify the client, in clear and unequivocal terms, that his case is in danger of dismissal due to his lawyer's dereliction; that the court will no longer tolerate the attorney's current course of conduct; and that the client is advised to be in touch with his lawyer to ensure future compliance with court orders, or to make arrangements for new counsel. If after this notification the attorney persists in the errant conduct, then the client shares in the responsibility for that conduct, and dismissal will generally be upheld.

795 F.2d at 1078 (emphasis in original)

When recognition is given to recent holdings that due process requires that notice and the opportunity to be heard be given to an affected person before monetary sanctions can be imposed, *see DeLuca v. Long Island Lighting Co.*, 862 F.2d 427, 430 (2d Cir. 1988) (sanctions under Rule 38, Fed. R. App. P.); *Braley v. Campbell*, 832 F.2d 1504, 1514-55 (10th Cir. 1987) (sanctions under Rule 11, Fed. R. Civ. P.); Note Rule 11: What Process is Due, 62 St. John's L. Rev. 586 (1988), then certainly due process requires that notice to the party itself be given before it is forever deprived of its claim or defense by the striking of its complaint or answer because of its attorney's misconduct, particularly where, as here, the California Court of

Appeal acknowledged that the party had no participation in or knowledge of that misconduct and did not even know of the interposition against it of the cross-complaint upon which its default was entered. (Appendix at pp. 2a, 9a)

Recognition that there is a different standard to be applied when meting out sanctions to attorneys as distinct from their clients is also found in Rule 11 cases as to which certiorari was recently granted by this Court in *Cooter & Gell v. Hartmarx Corporation, et al.*, 89-275, 58 U.S.L.W. 3252. An objective standard has been utilized to sanction an attorney whereas a subjective standard has governed sanctions against a party.

As this Court has held, the Due Process Clause specially guarantees a litigant "the opportunity to present his case and have its merits fairly judged". *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Petitioner has been unfairly and unconstitutionally deprived of that opportunity here.

Conclusion

For the foregoing reasons Radix Group International, Inc. respectfully requests that its Petition for a Writ of Certiorari be granted.

Dated: New York, New York
November 6, 1989

Respectfully submitted,

Ronald J. Offenkrantz
(Counsel of Record)

M. James Spitzer
Michael H. Smith
Spitzer & Feldman, P. C.

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APPENDIX A - OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE, FILED MAY 24, 1989 [PP. 1a - 12a]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

RADIX GROUP INTERNATIONAL, INC., et al.,	)	2d Civil No. BO35222
	)	(Super. Ct.
	)	No. C571869)
	)	
Plaintiffs, Cross-Defendants, and Appellants,	)	
	)	
v.	)	
	)	
McGRIFF TREADING COMPANY, INC., et al.,	)	
	)	
	)	
Defendant, Cross-Complaint, and Respondent.	)	

APPEAL from an order of the Superior Court of Los Angeles County. Paul Turner, Judge. Affirmed.

King, Weiser, Edelman & Bazar, Jacqueline M. Scheck for Plaintiff, Cross-Defendant, and Appellant Radix Group International, Inc.

Kalisch & Fisher, Gail A. Reisman for Defendant, Cross-Complaint, and Respondent McGriff Treading Company, Inc.

INTRODUCTION

Plaintiff and cross-defendant Radix Group International, Inc. (Radix) appeals from an order of dismissal on its complaint against defendant and cross-complainant McGriff Treading Company, Inc. (McGriff) and from the denial of a motion to set aside a default judgment in favor of McGriff on its cross-complaint. In each matter, the trial court found that negligent conduct by counsel for Radix, Michael Armenta (Armenta), did not constitute positive misconduct and refused to relieve Radix of the consequences of his noncompliance with previous court orders. We affirm.

FACTUAL AND PROCEDURAL STATEMENT

Radix is engaged in providing customs brokerage and freight-forwarding services and for several years retained Armenta as its counsel. On October 25, 1985, Armenta filed a complaint against McGriff on behalf of Radix alleging that McGriff had failed to pay for certain services pursuant to an oral agreement between the parties. On March 24, 1986, McGriff answered the complaint and concurrently filed a cross-complaint alleging, inter alia, that Radix had unlawfully refused to release a shipment of tires to which it was entitled. On May 1, 1986, Armenta filed a general denial to the cross-complaint, which included several affirmative defenses. Apparently, he did not inform anyone connected with Radix of McGriff's cross-complaint.

On May 5, 1986, McGriff served a set of interrogatories on Radix through Armenta. According to counsel for McGriff, these "contention interrogatories" were crucial to McGriff's defense because both the complaint and answer to the cross-complaint were unverified. When questioned about his initial failure to respond, Armenta said he had not received the interrogatories and was sent an additional copy. On July 28, 1986, he served responses on behalf of Radix. However, McGriff deemed them inadequate and made several contacts with Armenta or his office in an attempt to resolve the discovery impasse without court intervention. Being unsuccessful, McGriff filed a motion to compel further answers to interrogatories on November 5, 1986. The day before the hearing on this motion, Armenta provided McGriff with satisfactory responses and the matter was taken off calendar.

On July 16, 1987, McGriff served a request for production of documents. Armenta failed to respond timely but later assured counsel for McGriff the documents would be forthcoming. However, the dicovery never materialized; and McGriff filed a motion to compel production. Armenta then served a "purported response and a handful of documents," which McGriff deemed "defective."

On December 2, 1987, the court granted the motion and ordered Radix "to produce all documents requested, without objection, within fifteen days." Despite the court order, no further documents were forthcoming. Accordingly, on January 15, 1988, McGriff filed a motion for terminating sanctions requesting that the court dismiss Radix's complaint with prejudice and strike its answer to the cross-complaint with entry

of default. On behalf of Radix, Armenta filed opposition to the motion for terminating sanctions and supplemental responses to the request for production of documents.

On February 3, 1988, the court heard the motion for terminating sanctions. It refused to read Radix's opposition because it was untimely. Based upon the moving papers, the court granted the motion as follows: "The court finds that the willfull failure without any justification to produce relevant documents has prejudiced defendant and cross-complainant. No other sanction will be adequate to protect McGriff's rights. The complaint of Radix Group International is stricken and dismissed as to McGriff Treading Co. and the answer to the cross-complaint of Radix is stricken and Radix's default is entered. . . . The prove-up on the cross-complaint is set for March 18, 1988. . . . On the same date . . . a status conference will be held and Radix' counsel is ordered to be present."

At the prove-up, McGriff submitted documentary evidence in support of its claim for compensatory and punitive damages. Because the cross-complaint did not give proper notice of the amount of damages sought, the court could not grant the full relief prayed for. However, the court was satisfied that Radix had notice of potential damages in the sum of $29,000.00 and punitive damages in the sum of $40,000.00 and awarded judgment to McGriff in those amounts.

Armenta did not appear at the status conference on March 21, 1988, and the court ordered Radix to show cause why its complaint should not be dismissed for the failure to appear. Written response was to be filed by March 29, 1988.

Armenta responded to the order to show cause and explained that he had received notice from the court clerk's office that the status conference was scheduled for April 13, 1988, not March 21. The court was not persuaded but did not dismiss the complaint. Instead, it reaffirmed the April 13, 1988, status conference date and expressed its intention to dismiss the complaint in the event of nonappearance by Radix.

On April 13, 1988, Armenta did not appear at the status conference, and the court ordered Radix to show cause why "sanctions should not be imposed for failure to provide an attorney prepared to conduct a proper status conference." A written response was due April 27. Prior to that date, Radix attempted to substitute counsel but apparently Armenta was initially uncooperative. The record is not clear whether Armenta filed a written response to the order to show cause, but on April 27, 1988, he did not appear. In view of the perceived recalcitrance, the court dismissed Radix's complaint.

Radix continued to attempt to substitute new counsel in place of Armenta. Thereafter, on May 2, 1988, rather than transferring Radix's files to new counsel, Armenta filed a motion to compel discovery and a motion to vacate and set aside the order striking Radix's answer to the cross-complaint. On May 17, 1988, the motion was taken off calendar due to insufficient notice. Radix's contemporaneous motion for order substituting counsel was granted.

On May 18, 1988, Radix's new counsel filed a motion to set aside the default and default judgment on the cross-complaint and the dismissal on the complaint. Radix filed several declarations by officers and other personnel in support

of the motion. In substance, these declarations described the following circumstances respecting Armenta's representation of their interest. Sometime in 1986, after several years of representation, Radix requested a summary of pending cases. Regarding the McGriff action, Armenta informed Radix the case was in litigation with discovery ongoing. However, Armenta did not explain that McGriff had filed a cross-complaint or provide any other details. In other respects, Armenta was also generally unresponsive to keeping Radix informed of developments in various litigation. Two declarants also stated that they had never signed any discovery documents and their signatures thereon had been forged. They also explained that in another matter being handled by Armenta, he had failed to forward money he had collected on judgments in their behalf.

Based upon the declarations, Radix sought to establish that Armenta had severed the attorney-client relationship and engaged in positive misconduct to the extent that his negligence should not be imputed to them and they should be relieved from default. After hearing on June 3, 1988, the court denied all motions. The court found no positive misconduct or de facto severance of the attorney-client relationship, citing specific instances in which Armenta evidenced his ongoing involvement with the litigation as counsel for Radix. The court also credited McGriff's assertion of prejudice if the judgment were to be set aside. The court concluded as follows: "[T]here is no admissible evidence which indicates that [Radix] is entitled to any judgment on the merits and the evidence addressed in connection with the prove-up indicates that Radix is not entitled to a single penny." Radix filed a timely notice of appeal.

ISSUE PRESENTED

The sole issue is whether the record establishes positive misconduct by Armenta entitling Radix to relief from the terminating sanctions and default occasioned by counsel's negligence.

DISCUSSION

Code of Civil Procedure section 473 permits the trial court to "relieve a party . . . from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect." "A motion seeking such relief lies within the sound discretion of the trial court, and the trial court's decision will not be overturned absent an abuse of discretion. [Citations.] However, the trial court's discretion is not unlimited and must be '"exercised in conformity with the spirit of the law and in a manner to subserved and not to impede or defeat the ends of substantial justice."' [Citations]" (*Elston v. Turlock* (1985) 38 Cal.3d 227, 232-233, footnote omitted.)

Although the defaulting act may have been committed by his or her attorney, nevertheless, "a party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable 'because the negligence of the attorney . . . is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] The client's redress

for inexcusable neglect by counsel is, of course, an action for malpractice. [Citations.]" (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898.)

Radix does not attempt to defend Armenta's deficiencies in handling the litigation and "recognize[s] the general rule that neglect of the attorney is imputed to his client and may not be offered by the latter as a basis for relief [citation], but argue[s] that in the present case the following exception applies: ' "[E]xcepted from the rule are those instances where the attorney's neglect is of that extreme degree amounting to *positive misconduct*, and the person seeking relief is relatively free form negligence. [Citations omitted.] The exception is premised upon the concept the attorney's conduct, in effect, *obliterates the existence of the attorney-client relationship*, and for this reason his negligence should not be imputed to the client." (Italics added.) [Citations.] Courts applying that exception have emphasized that "[a]n attorney's authority to bind his client does not permit him to impair or destroy the client's cause of action or defense." [Citations.]' (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898 [].)" (*Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1078.)

In examining and delineating the nature and quality of the "positive misconduct" sufficient to invoke the foregoing exception, the Supreme Court in *Carroll v. Abbott Laboratories, Inc., supra*, reviewed *Buckert v. Briggs* (1971) 15 Cal.App.3d 296, *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, and *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, all of which resolved this issue in favor of the client. "What *Daley, Orange Empire and Buckert* have in common is a total failure on the part of counsel to represent the client: each attorney

had de facto substituted himself out of the case. Under such circumstances it would have been unconscionable to apply the general rule charging the client with the attorney's neglect." (*Carroll v. Abbott Laboratories, Inc., supra,* 32 Cal.3d at p. 900.) The case before the Court, however, contrasted markedly: "Though counsel grossly mishandled a routine discovery matter, no abandonment of the client appears." (*Ibid.*)

The facts of this case also fail to establish "positive misconduct" by the attorney or evidence of an abandonment of the client. On the contrary, Armenta continued to represent Radix's interests throughout the litigation, however tardy or inept such efforts may have been. For example, while Armenta may not have informed Radix of McGriff's cross-complaint, he did file a timely answer. Signatures may have been forged in some discovery matters, but Radix makes no claim that the documents themselves contain prejudicial inaccuracies. Any alleged theft of funds did not involve this case and apparently did not impair his involvement in this matter. And even though Armenta's conduct prompted the motions for terminating sanctions and dismissal, he did file opposition and, as the trial court pointed out, made some effort to avoid the ensuing disaster.

On this record, we do not find any basis for relieving Radix of the consequences of Armenta's negligence. This is not a case of an attorney's "utter failure to represent his client" (*Orange Empire Nat. Bank v. Kirk, supra,* 259 Cal.App.2d at p. 353) by not responding to a cross-complaint and then neglecting to take any steps to seek relief from default. (*Id.*, at pp. 353-354.) Nor did Armenta engage in "consistent and long-continued inaction . . . so visibly and inevitably disastrous, that his client

was effectually and unknowingly deprived of representation." (*Daley v. County of Butte, supra,* 227 Cal.App.2d at p. 391.) In *Daley,* the attorney failed "to serve process, to appear at the pretrial conference, to communicate with the court, client, and other counsel, and the action [was] dismissed by reason of the attorney's misrepresentation . . . ." (*Orange Empire Nat. Bank v. Kirk, supra,* 259 Cal.App.2d at p. 353. In *Buckert v. Briggs, supra,* "[t]he attorney's conduct simulat[ed] rejection of the attorney-client relationship without knowledge of the plaintiffs" when he did not inform them of a new trial date, failed to appear himself, and made no effort to seek relief from the ensuing judgment. (*Id.*, at p. 301) Finally, in the more recent case of *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, the court found positive misconduct on a record that disclosed "no activity by, and no presence whatever of the attorney . . . after he filed the amended complaint. There [was] no evidence of his existence thereafter. . . . [H]is client was not even nominally represented." (*Id.*, at p. 739.)

Here, as in *Carroll v. Abbott Laboratories, Inc., supra,* "[t]hough counsel grossly mishandled a routine discovery matter, no abandonment of the client appears." (*Id.*, at p. 900) Thus, the trial court did not abuse its discretion in refusing to relieve Radix of the consequences of its attorney's negligence. This conclusion is consistent with case authority and comports with the following observations of the Supreme Court:

"'The policy that the law favors trying all cases and controversies upon their merits should not be prostituted to permit the slovenly practice of law or to relieve courts of the duty of scrutinizing carefully the affidavits or declarations filed in support of motions for relief to ascertain whether they set

forth, with adequate particularity, grounds for relief. [Fn. omitted.] When inexcusable neglect is condoned even tacitly by the courts, they themselves unwrittingly become instruments undermining the orderly process of the law.' [Citation.] Given this concern, the *Daley* exception should be narrowly applied, lest negligent attorneys find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to rise to ever greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship." (*Carroll v. Abbott Laboratories, Inc., supra*, 32 Cal.3d at p. 900.)

Nor did the trial court err in finding "there is no admissible evidence which indicates that [Radix] is entitled to any judgment on the merits and the evidence addressed in connection with the prove-up indicates that Radix is not entitled to a single penny." Although Radix had no right to counter McGriff at the prove-up (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385), McGriff was nontheless required affirmatively to establish its right to recovery. Under the facts, that evidence necessarily negated the claims of Radix's complaint; and the record demonstrates it was legally sufficient to do so. Accordingly, we find no denial of due process.

APPENDIX A

DISPOSITION

Judgment is affirmed. Appellant to bear costs on appeal.

NOT TO BE PUBLISHED

ARABIAN, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

Filed: May 24, 1989

APPENDIX B - ORDER OF THE SUPERIOR COURT STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, FILED MARCH 21, 1988 [PP. 13a - 14a]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

RADIX GROUP INTERNATIONAL, INC., a corporation, Plaintiff, v. McGRIFF TREADING COMPANY, INC., a corporation, GLOBE TRANSPORTATION SERVICES, INC., a corporation, and DOES 1 to 20, inclusive, Defendants.	Case No. C 571869 Orders Re: Prove-up
McGRIFF TREADING COMPANY, INC., a corporation, Cross-Complainant, v. RADIX GROUP INTERNATIONAL, INC., a corporation, GLOBE TRANSPORTATION SERVICES, INC., a corporation, and DOES 1 through 50, inclusive, Cross-Defendants.	

Regretfully, the court cannot grant the relief sought by cross-complainant McGriff Treading Company, Inc. The cross-complaint, except in two particulars which will be noted, fails to give cross-defendant proper notice of the amounts sought as

damages. In *Greenup v. Rodman* (1986) 42 Cal.3d 822, 826-831, the California Supreme Court held that a complaint similar to that in the case at bar would not support an award of damages after a discovery sanction was imposed entering a default because the pleading failed to identify with sufficient specificity the amount of damages sought.

However, paragraph 15 of the second cause of action does give notice as to the value of the 4 containers. That value is alleged to be a total of $29,000.00. The court is satisfied that cross-defendant was given notice of the potential damages in the sum of $29,000.00 could be imposed by reason of the conversion of the 4 containers. Accordingly, cross-complainant may only recover $29,000.00 in compensatory damage. Notice in the prayer is given of a request for at least $500,000.00 in punitive damages and the court after weighing the relevant factors imposes punitive damages in the sum of $40,000.00. The court declines to add the prior sanctions award to the judgment. A writ of execution will be issued based on the minute orders. Interest is to run from today's date and costs are allowed in the sum of $136.50. A judgment is to be prepared and filed within 5 days which is consistent with this minute order.

The request to the clerk to enter default is denied as moot. A default has previously been entered.

DATED: March 21, 1988

S/_____

PAUL TURNER
Judge of the Superior Court

PT:11

Filed: March 21, 1988

APPENDIX C - ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ENTERED JUNE 3, 1988 [PP. 15a - 16a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 69

DATE JUNE 3, 1988
HONORABLE PAUL TURNER

C 571 869
RADIX GROUP INTERNATIONAL, INC., A CORPORATION
VS.
McGRIFF TREADING COMPANY, INC., A CORPORATION, ETC., ET AL.

NATURE OF PROCEEDINGS.

MOTION OF PLAINTIFF RADIX GROUP INTERNATIONAL INC. FOR ORDER TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT OF CROSS-COMPLAINT, REINSTATE ANSWER TO CROSS-COMPLAINT, AND SET ASIDE DISMISSAL OF COMPLAINT;

All motions are denied. The facts of this case do not conform to the factual scenario in the cases involving "positive misconduct" discussed at pages 899-900 of *Carroll v. Abbott Laboratories* (1982) 32 Cal. 3d 892. Also, this is not a case where there is a de facto severance of the attorney-client relationship. *(Carroll v. Abbott Laboratories, supra*, 32 Cal. 3d at 901.) For example, on February 2, 1988, Radix filed a 42 page opposition to the terminating sanction motion. On March 29, 1988, a written response to the order to show cause re dismissal was filed and the court declined to dismiss the case based on the Armenta declaration. On April 13, 1988, a lawyer from the

Armenta firm appeared at the status conference and on May 2, 1988, two motions for relief from the prior court orders were filed by the Armenta firm. The court further credits the analysis appearing in the Reisman declaration concerning the prejudice to be suffered if the judgment were set aside. Finally, there is no admissible evidence which indicates that plaintiff is entitled to any judgment on the merits and the evidence addressed in connection with the prove-up indicates that Radix is not entitled to a single penny. The motion to strike portions of the Donovan and Madison declarations are denied.

Minutes Entered
JUNE 3, 1988
County Clerk

APPENDIX D - DECISION AND ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ENTERED FEBRUARY 3, 1988 [PP. 17a - 18a]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF LOS ANGELES

DEPT. 69

DATE FEBRUARY 3, 1988
HONORABLE PAUL TURNER

C 571 869
RADIX GROUP INTERNATIONAL,
INC., A CORPORATION
VS.
McGRIFF TREADING COMPANY,
INC., A CORPORATION, ETC.,
ET AL.

NATURE OF PROCEEDINGS.

MOTIONS OF DEFENDANT/CROSS-COMPLAINANT McGRIFF TREADING COMPANY, INC. FOR TERMINATING SANCTION OF DISMISSAL OF PLEADINGS WITH PREJUDICE AND FOR ADDITIONAL SANCTIONS, OR IN THE ALTERNATIVE, MOTION TO COMPEL FURTHER RESPONSES TO DEMAND FOR PRODUCTION AND INSPECTION AND FOR ADDITIONAL MONETARY SANCTIONS, AND TO COMPEL OBEDIENCE TO PRIOR COURT ORDER AGAINST PLAINTIFF/CROSS-DEFENDANT RADIX GROUP INTERNATIONAL, INC.;

The terminating sanction motion is granted. The court finds that the willfull failure without any justification to produce relevant documents has prejudiced defendant and cross-complainant. No other sanction will be adequate to protect McGriff's rights. The complaint of Radix Group International is stricken and dismissed as to McGriff Trading Co. and the answer to the cross-complaint of Radix is stricken and Radix's default is entered. (Code Civ. Proc. § § 2023, subd. [b], subs. [4];

2031, subd. [k]). A monetary sanction is imposed in favor of McGriff Trading Co. and against Radix in the sum of and against Radix in the sum of $ 2,264.00 payable forthwith. The prove-up on the cross-complaint is set for March 18, 1988, 9:00 a.m. in Department 69. On the same date and at the same time a status conference will be held and Radix' counsel is ordered to be present. The court has not read the opposition because it was not timely filed.

Minutes Entered
FEBRUARY 3, 1988
County Clerk

APPENDIX E - ORDER OF THE SUPREME COURT OF CALIFORNIA, FILED AUGUST 10, 1989

ORDER DENYING REVIEW

After Judgment by The Court of Appeal

Second Appellate District, Division Three, No. BO35222
SO10915

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA,

IN BANK

RADIX GROUP INTERNATIONAL INCORPORATED Et Al., Appellants

-v-

MC GRIFF TREADING COMPANY INCORPORATED, Respondent

Appellant's petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

EAGLESON

Acting Chief Justice

FILED: August 10, 1989

APPENDIX F - JUDGEMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ENTERED MARCH 25, 1988 [PP. 20a - 21a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

	Case Number
RADIX GROUP INTERNATIONAL, INC., A CORPORATION Cross-complainant VS. McGRIFF TREADING COMPANY, INC., A CORPORATION, ETC., ET AL. Defendant(s)	C571 869 JUDGMENT BY COURT AFTER DEFAULT

This cause came on to be heard before Honorable Paul Turner, Judge presiding in Department 69, on March 18, 1988, Gail A. Reisman, Esq. and the Law Offices of Kalisch & Fisher appearing as attorney for cross-complainant, and it appearing that cross-defendant(s), RADIX GROUP INTERNATIONAL, INC., a corporation having been regularly served with process, having repeatedly engaged in abuses of the discovery process resulting in the imposition of a terminating sanction per C.C.P. Section 2023(b) (4) & 2031(k), and the default of said defendant(s) having been duly entered and evidence having been introduced in open session of this Court or having been considered by the Court:

It is therefore ordered, adjudged, and decreed that cross-complainant McGRIFF TREADING COMPANY, INC., a corporation recover from said cross-defendant(s) the principal sum of $29,000.00 *, interest on said sum to the date hereof in the sum of $ 0, and attorney's fees in the sum of $ 0, total of $69,000.00, with plaintiff(s) costs and disbursements amounting to the sum of $136.50, together with interest on said judgment as provided by law from March 21, 1988. The Clerk is ordered to enter the judgment.

---

* Compensatory damages plus punitive damages in the sum of $40,000.00 awarded

Dated: March 25, 1988

s/_____
Paul Turner
Judge

Judgment by Court After Default

APPENDIX G - POINT III OF PETITIONER'S OPENING BRIEF IN THE COURT OF APPEAL [PP. 22a - 24a]

III.

RADIX WAS NEVER GIVEN THE OPPORTUNITY TO CHALLENGE THE EVIDENCE ADDUCED BY McGRIFF

In denying RADIX' motion for relief, the trial court found no admissible evidence which indicated that RADIX would be entitled to judgment on the merits of its complaint, and that McGRIFF's evidence, offered in connection with its default prove-up of the cross-complaint, indicated that RADIX was not entitled to "a single penny."

The court's ruling disregards the fact that the only evidence allowed before the court was that unchallenged evidence offered by McGRIFF. A cross-defendant cannot participate in the hearing on a default judgment, which is based solely on the cross-complainant's evidence. *Devlin v. Kearny Mesa AMC/Jeep/Renault* (1984) 155 Cal.App.3d 381, 202 Cal.Rptr. 204.

RADIX never had an opportunity to prove its own case; ARMENTA had all of the relevant files and evidence and refused to release them to RADIX' new counsel. Further, RADIX never had an opportunity to impeach McGRIFF's declarants or to offer contradictory evidence. Indeed, since RADIX did not know of the cross-complaint until on or about April 21, 1988, RADIX did not even have sufficient opportunity

to investigate McGRIFF's claims before filing its motion for relief on May 18, 1988.

The court's failure to grant RADIX the chance to challenge McGRIFF's evidence constitutes a violation of RADIX' rights to procedural due process, particularly as the court did not hold an evidentiary hearing and inquire as to the truth or falsity of the statements made by McGRIFF's witnesses, but nonetheless awarded punitive damages against RADIX. For example, if allowed to challenge McGRIFF's evidence, RADIX would be able to show (although this is not in the record on appeal, as RADIX was precluded from so showing) that at all times, the tires which McGRIFF alleges were converted by RADIX were -- and are -- in the custody and possession of United Sates Customs, and that McGRIFF had sufficient information to locate those tires. The only declaration presented by McGRIFF to prove the merits of its causes of action (CT 487) was conclusory and insufficient to prove the claim, and was impeachable. The declarant, Randy Drake, stated that he and "other McGRIFF employees" made "numerous and consistent attempts to locate the March shipment." Mr. Drake was not competent to testify regarding the attempts allegedly made by the "other" employees; the court never asked him to specify what those attempts were, and RADIX never had an opportunity to ask him whether McGRIFF ever tried to find the tires through U. S. Customs.

The law requires that a defendant (or cross-defendant) be given notice of his potential liability. *Greenup v. Rodman* (1986) 42 Cal.3d 822, 231 Cal.Rptr. 220. RADIX did not have notice of its potential liability. McGRIFF's claims were by way of cross-complaint, served not upon the cross-defendant but only

upon an attorney who no longer represented his RADIX' interests.

Under other circumstances, the attorney's knowledge of the cross-action would certainly be imputed to his client. Under the circumstances of this case, to do so would only impede and denigrate justice.

APPENDIX H - POINT II OF PETITIONER'S REPLY BRIEF IN THE COURT OF APPEAL [PP. 25a - 30a]

II.

OTHER COURTS HAVE REQUIRED SCIENTER ON THE PART OF THE CLIENT BEFORE TERMINATING SANCTIONS MAY BE IMPOSED

This case poses an issue of constitutional dimensions and a violation of procedural due process as the terminating sanction was not imposed for any "willful" acts by RADIX, which had no knowledge of either the default in connection with the cross-complaint or the outlandish nature of Armenta's "representation".

The Fifth Amendment limits the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. *Societe Internationale v. Rogers*, 357 U.S. 197, 209, 78 S.Ct. 1087, 2 L.ED.2d 1255 (1958). The rules for non-compliance with discovery orders should not be construed to authorize dismissal when the non-compliance is not due to the willfulness, bad faith or other fault of the party itself. Id., 357 U.S. at 212. *Accord, Nat'l Hockey League v. Metropolitan Hockey CLub, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976);

The propriety of striking a party's answer and entering a default judgment against the party claiming no knowledge of his attorneys' actions was recently addressed by the United

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States Court of Appeals for the Tenth Circuit, under the provisions of Rule 37 of the Federal Rules of Civil Procedure (analogous to C.C.P. § 2023). *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869 (10th Cir. 1987).

As in our case, in *M.E.N.*, *supra*, the District Court had entered a default judgment against the defendant following the failure to provide discovery or appear for noticed depositions, a failure to obey a court order to appear for depositions, a failure to file pretrial memoranda, and a failure to pay previously-granted sanctions. The District Court denied defendant's motion to vacate the default judgment on the grounds that the attorneys, rather than the defendant personally, had been at fault.

In reversing the District Court's denial of the motion, the Court of Appeals noted that Rule 37 (b) (2) of the Federal Rules of Civil Procedure authorizes default judgments against parties who fail to comply with court orders or fail to attend depositions or serve answers to interrogatories. *M.E.N.*, *supra*, 834 F.2d at 872. The reviewing court found the remedy of a default judgment to be "harsh" and raised questions of due process, particularly where the client was not aware of the acts and conduct of the attorney. In remanding the matter to the trial court for further consideration, the Court of Appeals said:

> "Because a default judgment is a harsh sanction, due process requires that 'failure' is a sufficient ground only when it is the result of 'wilfulness, bad faith, or [some] fault of petitioner' rather than inability to comply. *National Hockey League*, 427 U.S. at 640 [other citations omitted] . . . We have defined

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> a willful failure as 'any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown.' [Citations omitted.]" *M.E.N.*, 834 F.2d at 872.

The *M.E.N.* court observed that whereas under certain circumstances attorney misconduct might be a sufficient basis for a default judgment, with the client's remedy to be found in an action for malpractice, the sanction of dismissal of a party's claim for such misconduct is inappropriate against a party unaware of the conduct because "where *sanctions* are concerned . . . we have cautioned that '[i]f the fault lies with the attorneys, that is where the impact of the sanctions should be lodged.' [Emphasis added.] *Id.* at 873.

The difference was held to be fundamental in the sense that if the trial court, on remand, were to find that the attorneys:

> "failed to communicate with their clients during the course of the litigation, and in particular if they failed to inform their clients of such critical matters as court orders, it [the trial court] should consider the possibility of attorney discipline . . . In addition, it should consider referring the matter to state licensing authorities for appropriate discipline. Such conduct on the part of attorneys would appear to violate the Code of Professional Responsibility, and might call into question their fitness to practice law." *M.E.N.*, 834 F.2d at 873, n. 2.

If, on the other hand, the trial court were to find that the attorneys communicated with their clients, there would be a sufficient basis to sustain a default judgment. The court held that the trial court had erred in failing to make specific findings

on whether the client's conduct met the willful non-compliance standard and that the order imposing sanctions did not explain why the sanction was directed at the defendant rather than at its attorneys. *M.E.N.*, 834 F.2d at 873. *Accord, Woodmore v. Git-N-Go*, 790 F.2d 1497 (10th Cir. 1986).

Similarly, in *Edgar v. Slaughter*, 548 F.2d 770 (8th Cir. 1977), a default judgment on a defendant's counterclaim was vacated. The court stated that "in our system of justice the opportunity to be heard is a litigant's most precious right and should be sparingly denied" such that:

> "Dismissal and entry of a default judgment should be the rare judicial act. When noncompliance is the result of dilatory conduct by counsel, the courts should investigate the attorney's responsibility as an officer of the court and, if appropriate, impose on the client sanctions less extreme than dismissal or default, unless it is shown that the client is deliberately or in bad faith failing to comply with the court's order." 548 F.2d at 773.

Cases in the Ninth Circuit have also required scienter on the part of the party itself as a prerequisite to the imposition of a terminating sanction.

> "[I]n order to warrant imposition of these severe sanctions, the violation(s) must be 'due to willfulness, bad faith, or fault *of the party.*'" [Emphasis added.] *United States v. Kahaluu Construction Co., Inc.*, 857 F.2d 600, 603 (9th Cir. 1988); *see also, Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585 (9th Cir. 1983).

The trial judge in the present matter vigorously admonished Armenta for his numerous transgressions. Without

question the trial court had the authority to assess monetary sanctions against Armenta and to control the court's calendar by holding the attorneys before it to the appropriate standards of conduct.

The major issue, however, involves the trial court's award of the extreme sanction of entering a default judgment against a client without any findings or conclusions that the client encouraged, instigated or even knew about Armenta's outrageous acts and without the court even reading the memorandum which Armenta belatedly submitted the day before the hearing on McGRIFF's motion for the terminating sanction.[1] Accepting "prove-up" declarations *in this situation* without giving RADIX the opportunity to challenge the "evidence", and thereupon assessing punitive damages against RADIX, becomes a venting of a judicial spleen against the client without the opportunity to be heard and rises to the level of constitutional deprivation.

On more than one occasion, a court has directed an attorney to have his client in the courtroom for a conference or for some other purpose. Appellant respectfully suggests that, given the outrageous nature of the attorney's conduct in this matter and the severity of the penalties to RADIX (including the award of punitive damages), the trial judge should have ordered that an officer of RADIX personally appear in court before the terminating sanctions were granted.

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[1] McGriff misleads this Court when it suggests that Armenta's memorandum was read in opposition to the motion. (*See* Respondent's Brief, pages 9 and 25.) The records clearly reflects that it was no. (CT 375.)

This suggestion is particularly appropriate where a cross-complaint seeking punitive damages has been interposed and where the attorney's blatant disregard for the court's order and rules and continued failure ever to appear in court on motions, conferences and hearings should have alerted the court and McGRIFF that something was seriously amiss; there could be absolutely no reason for a *plaintiff* such as RADIX to follow such a self-destructive strategy. For McGRIFF or anyone to believe that RADIX would knowingly choose to have its counsel not appear for motion hearings and court-ordered conferences, and not to oppose a motion for a terminating sanction, is simply absurd. It is doubtful whether this Court has ever seen such a complete abandonment of a client's interests as Armenta's abandonment of RADIX.

Appendix I - Point II & III of Petitioner's Brief on Petition For Review in The Supreme Court of California [pp. 31a - 37a]

II.

IT WAS AN ABUSE OF DISCRETION AND A DEPRIVATION OF CONSTITUTIONAL DUE PROCESS FOR THE SUPERIOR COURT TO GRANT TERMINATING SANCTIONS WITHOUT CONSIDERATION OF WHETHER OF WHETHER A LESSER SANCTION WOULD HAVE SERVED THE PURPOSE AND WITHOUT A FINDING OF WILFULNESS ON THE PART OF RADIX OR AN OPPORTUNITY TO BE HEARD

The Superior Court issued its terminating sanctions against Radix, pursuant to California Code of Civil Procedure §2023 (b) (4), in the form of dismissal of Radix' complaint against McGriff, striking Radix' answer to McGriff's cross-complaint and rendering a judgment by default thereon against Radix, all because of Armenta's failure to comply with discovery. While Section 2023 (b) (4) does provide that "the court may impose a termination sanction by *one* of the following orders" in the event of discovery abuse, such sanctions should be viewed as sanctions of last resort and should not be used when a lesser sanction would have served the same purpose. As the Court recognized in *Thomas v. Luong* (1986) 187 Cal.App.3d 76, 231 Cal.Rptr. 631, terminating sanctions, particularly the striking of an answer and the entry of a default judgment, should be used sparingly and only when lesser sanctions have failed, since the result is to give a windfall to the moving party. *See also, Fred Howland Co. v. Superior Court* (1966) 244 Cal.App.2d 605, 53 Cal.Rptr. 341. In addition, a terminating sanction can only be

imposed if the *party's* failure to give discovery is willful. *Midwife v. Bernal* (1988) 203 Cal.App.3d 57, 249 Cal.Rptr. 708. Here, the lower court's imposition of terminating sanctions, without consideration of the appropriateness of a lesser sanction and without consideration of whether the failure to comply was willful on the part of Radix as opposed to its counsel, was an abuse of discretion. The lower court also abused its discretion in imposing not one but three terminating sanctions in contravention of the language of §2023(b) (4).

This case poses, as well, an issue of constitutional dimensions and a violation of procedural, due process as the terminating sanctions were not imposed for any "willful" acts by Radix. Neither the court below nor the Superior Court concluded that Radix had knowledge of either the default in connection with the cross-complaint - which everyone agrees Radix did not know about - or Armenta's outlandish "representation".

The Fifth Amendment limits the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958). *Midwife v. Bernal, supra*, 203 Cal.App.3d at 64. The rules for non-compliance with discovery orders should not be construed to authorize dismissal when the non-compliance is not due to the willfulness, bad faith or other fault of the party itself. *Societe Internationale, supra*, 357 U.S. at 212. *Accord, Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

The propriety of striking a party's answer and entering a default judgment against the party having no knowledge of his attorneys' actions has been addressed by several federal courts under the provisions of Rule 37 of the Federal Rules of Civil Procedure (upon which C.C.P. §2023 was patterned), and most recently addressed by the United States Court of Appeals for the Tenth Circuit. *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869 (10th Cir. 1987).

As in this case, in *M.E.N., supra*, the District Court had entered a default judgment against the defendant following the failure to provide discovery or appear for noticed depositions, a failure to file pretrial memoranda, and a failure to pay previously-granted sanctions. Defendant's motion to vacate the default judgment on the grounds that the attorneys, rather than the defendant personally, had been at fault, was denied.

In reversing the District Court's denial of the motion, the Court of Appeals noted that Rule 37(b) (2) of the Federal Rules of Civil Procedure authorizes default judgments against parties who fail to comply with court orders or fail to attend depositions or serve answers to interrogatories. *M.E.N., supra,* 834 F.2d at 872. The reviewing court found the remedy of a default judgment to be "harsh" and raised questions of due process, particularly where the client was not aware of the acts and conduct of the attorney. In remanding the matter to the trial court for further consideration, the Court of Appeals said:

> "Because a default judgement is a harsh sanction, due process requires that 'failure' is a sufficient ground only when it is the result of 'wilfulness, bad faith, or [some] fault of petitioner' rather than inability to comply.

> *National Hockey League*, 427 U. S. at 640 [other citations omitted . . . We have defined a willful failure as 'any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown.' [Citations omitted.]" *M.E.N.*, 834 F.2d at 872.

The *M.E.N.* court observed that whereas under certain circumstances attorney misconduct might be a sufficient basis for a default judgment, with the client's remedy to be found in an action for malpractice, the sanction of dismissal of a party's claim for such misconduct is inappropriate against a party unaware of the conduct because "where *sanctions* are concerned. . . we have cautioned that '[i]f the fault lies with the attorneys, that is where the impact of the sanctions should be lodged.'" [Emphasis added.] *Id.* at 873.

The court held that the trial court had erred in failing to make specific findings on whether the client's conduct met the willful non-compliance standard and that the order imposing sanctions did not explain why the sanction was directed at the defendant rather than at its attorneys. *M.E.N.*, 834 F.2d at 873. *Accord, Woodmore v. Git-N-Go*, 790 F.2d 1497 (10th Cir. 1986).

Similarly, in *Edgar v. Slaughter*, 548 F.2d 770 (8th Cir. 1977), a default judgment on a defendant's counterclaim was vacated. The court stated that "in our system of justice the opportunity to be heard is a litigant's most precious right and should be sparingly denied" such that:

> "Dismissal and entry of a default judgment should be the rare judicial act. When noncompliance is the result of dilatory conduct by counsel, the courts should investigate the attorney's responsibility as an officer of the court

> and, if appropriate, impose on the client sanctions less extreme than dismissal or default, unless it is shown that the client is deliberately or in bad faith failing to comply with he court's order." 548 F.2d at 773.

Cases in the Ninth Circuit have also required scienter on the part of the party itself as a prerequisite to the imposition of a terminating sanction.

> "[I]n order to warrant imposition of these severe sanctions, the violation(s) must be 'due to wilfulness, bad faith, or fault of *the party.*'" [Emphasis added.] *United States v. Kahaluu Construction Co., Inc.*, 857 F.2d 600, 603 (9th Cir. 1988); *see also, Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585 (9th Cir. 1983).

The trial judge in the present matter vigorously admonished Armenta for his numerous transgressions. Without question the trial court had the authority to assess monetary sanctions against Armenta and to control the court's calendar by holding the attorneys before it to the appropriate standards of conduct. The major issue, however, involves the trial court's award of the extreme sanction of entering a default judgment against a client on a cross-complaint about which the client encouraged, instigated or even knew about Armenta's outrageous acts.[3] Absent such a finding, the terminating sanctions issued here deprived Radix of property without due process.

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[3] It must be emphasized that Armenta was not authorized by Radix to act as its counsel on the cross-complaint which, had Radix known of the cross-complaint, it would have referred the cross-complaint to its insurance carrier.

On more than one occasion, a court has directed an attorney or a client to appear in the courtroom for a specific purpose. Appellant respectfully suggests that, given the outrageous nature of the attorney's conduct in this matter and the severity of the penalties to Radix (including the award of punitive damages) based on an alleged wilful act, the trial judge should have ordered that an officer of Radix personally appear in court before the terminating sanctions were granted. *See DeLuca v. Long Island Lighting Co.*, 862 F.2d 427 (2d Cir. 1988); *Braley v. Cambell*, 832 F.2d 1504, 1514-1515 (10th Cir. 1987) (to comport with due process, before sanctions imposed on counsel for a party, counsel required to show cause why such sanctions should not be imposed.)

This suggestion is particularly appropriate where a cross-complaint seeking punitive damages has been interposed and where the attorney's blatant disregard for the court's order and rules and continued failure even to appear in court on motions, conferences and hearing should have alerted the court and McGriff that something was seriously amiss; there could be absolutely no reason for a *plaintiff* such as Radix to follow such a self-destructive strategy. For McGriff or anyone to believe that Radix would knowingly choose to have its counsel not appear for motion hearings and court-ordered conferences, and not to oppose a motion for a terminating sanction, is simply absurd. It is doubtful whether this Court has ever seen such a complete abandonment of a client's interest as Armenta's abandonment of Radix.

III.

IT WAS AN ABUSE OF DISCRETION AND A DEPRIVATION OF DUE PROCESS FOR THE TRIAL COURT TO AWARD COMPENSATORY AND PUNITIVE DAMAGES AT THE EX PARTE "PROVE-UP" HEARING WHERE RADIX HAD NO OPPORTUNITY TO BE HEARD OR TO CONTEST THE EVIDENCE SUBMITTED AND WHERE THERE WAS NO PROOF OF ANY CONDUCT BY RADIX TO JUSTIFY PUNITIVE DAMAGES

Unlike many states, California does not permit a defaulted defendant to appear and participate in the "prove-up" hearing to determine damages. This practice results in a deprivation of the defendant's property without due process of law, particularly when that defendant's "default" occurred, as here, by the striking of its answer. Unlike the defendant who "defaults" by failing to answer the complaint, the defendant whose answer is subsequently stricken has shown its desire to contest both the allegations of liability and damages. As a matter of due process, a defendant who has been defaulted by the striking of its answer and thus found liable to the complainant, is still entitled to attend the "prove-up" hearing and contest the evidence submitted against it on the issue of damages.

It is a particular due process violation for California to allow punitive damages to be imposed against a defaulted defendant at a "hearing" at which it has no right to be heard, or by way of so-called declarations which are not subject to being impeached -- even if blatantly false -- such that Radix had

and has no right to submit evidence against such an award or demonstrate to the Court that the conversation claim is made court of whole cloth.

In the case at bar, the award of punitive damages against Radix at the "prove-up" hearing was a violation of due process. In addition, the award of punitive damages was an abuse of discretion as there was no proof of any "oppression, fraud or malice" by Radix (Civil Code § 3294) and there was no justification given by the lower court for such an award except, apparently, to grant to McGriff "damages" to which they were otherwise not entitled.[4]

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[4] McGriff had sought $51,726.97 as compensatory damages at the "prove-up" hearing but was found to be entitled only to $29,000.00.